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IN THE

Supreme Court of the United States

October Term, 1968

No. 1270

MELVIN McCOWN,

Petitioner,

against

HUMBLE OIL AND REFINING COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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HARVEY GOLDSTEIN
on the Petition

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above entitled matter on January 16, 1969.

Opinions of the Courts Below

The opinion of the United States District Court for the Eastern District of Virginia, Newport News Division, by Honorable John A. MacKenzie, officially reported at 293 F. Supp. 444, is set forth in the appendix to the petition at pages 11 to 16.

The opinion of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court, officially reported at 405 F.2d 596, is set forth in the appendix to this petition at pages 17 to 23.

Jurisdiction

This action, arising out of a maritime tort to a harbor worker aboard a vessel in navigable waters and within the Admiralty and Maritime jurisdiction, was brought in the United States District Court for the Eastern District of Virginia, Newport News Division, on the Civil side of the Court, predicated upon diversity of citizenship and jurisdictional amount.

The decision of the District Court, and judgment entered thereon, dismissing the cause, was appealed from by Petitioner.

The decision of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the District Court, was handed down on January 16, 1969. Judgment was entered on January 16, 1969.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1254(1).

Questions Presented

1. Did the use by shore-based maritime workers of new work methods to perform the same ship's work, traditionally performed by seamen in furtherance of ship's business, destroy the maritime rights of those workers.

2. Did the use by shore-based workers of new machinery to perform the same ship's work, traditionally

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2. Did the use by shore-based workers of new machinery to perform the same ship's work, traditionally

performed by seamen in furtherance of ship's business, destroy the maritime rights of those workers?

3. Was there a question of fact as to whether the work to be performed by the shore-based workers under the contract was maritime in nature and of a character traditionally performed by seamen?

Statutes Invoked

There are no statutes involved herein.

Statement of Facts

Petitioner, MELVIN McCOWN, employed by the Newport News Shipbuilding & Drydock Company (hereinafter called shipyard) as a rigger, was severely injured on September 7, 1961 when he was struck by a sandsucking hose while working aboard the respondent's vessel, the Esso BERMUDA.

The vessel was brought into the shipyard on August 8, 1961 for its annual overhaul, tank coating and repairs (respondent's answer to petitioner's interrogatory #2), for its "annual repair period", as shown by the respondent in its log entries (Deft. Exh. 11).

The BERMUDA was neither entering nor coming from a "mothball" fleet; she was not out of navigation prior to the period of her annual overhaul but was on a voyage which had commenced on June 10, 1961, and which continued after leaving the yard (Deft. Exh. 11). Respondent retained full sailing Coast Guard certificates while at the yard (answer to interrogatory #10).

CURTIS W. KEECH (Deft. Exh. 10), respondent's inspector (page 6 of deposition) and an active sailing officer (pages 4, 6), employed by the respondent for 20 years

(page 3) admitted the presence of most of respondent's crew and *all* of its officers aboard the vessel during the entire operation (pages 11, 12), standing regular watches, the crew painting rooms and other parts of the ship under the direction of department heads (pages 13, 14), and performing other duties which could not be done when at sea (page 15), the engine room department checking hoses for water leaks, checking the bilge, the Mates inspecting for fire and inspecting the lines (page 16), the galleymen feeding the entire crew (page 18) who lived and worked aboard the vessel. KEECH testified that painting of the ship by the crew always took place in port because of the weather at sea and the necessary shifting of personnel when quarters were painted (page 15). Respondent's deck logs (Deft. Exh. 11) established the work schedule of the ship's crew while at the yard, constant inspection of the vessel (other than the shipyard work area), watches maintained on a 24 hour basis, the trial runs of the engine, boat drills, bunkers taken on for the resumption of commercial transit, beginning on September 5th, two days before petitioner's accident.

As stated by the respondent in answer to interrogatory #19, its Captain was in command of the ship's crew, the respondent's crew, who was aboard the respondent's vessel, working for the respondent, performing ship's duties in furtherance of ship's business in due and customary course while the shipyard completed its work.

KEECH's testimony (Deft. Exh. 10) was that the procedure and line of command on the BERMUDA was the same in the shipyard as at sea, that the vessel was operated in the same manner as when in transit (pages 18, 19). Further, even as to the work operation of the shipyard, an officer of the ship retained and had the power to have an unsafe procedure or dangerous conditions stopped or changed (pages 20, 21).

The respondent admitted in its Answer to Paragraph Seventh of the Amended Complaint that it managed and operated the vesel at all the times involved herein; an admission binding on respondent.

When examined in concert with the crew's activities prior to the shipyard period and while at the yard, the yard's work can be viewed only as a customary, periodic, maintenance operation necessary to keep the vessel in trade. KEECH pointed out that tank rust was always cleaned by the ship's crew at the start of each voyage (page 24), that corrosion was normal and customary and was to be expected (page 26), that the coating was done at the annual overhaul (page 27).

The work to the $9,000.000 ship, in the $400,000 contract between the respondent and the shipyard, consisted of repairs to the ship's boilers costing $1,275; renewal of pipes for $14,000 (including the cost of the piping from the supplier); repair of leaks in the tank bulkheads; installation of soot blowers at a cost of $19,000, including the purchase price; and replacement of the fire fighting system for $20,000; none of which required any structural change or conversion. All were to aid in the vessel's navigation and its carriage of cargo in furtherance of ship's business.

Additionally, the shipyard was to use a zinc paint coating which the *respondent* had recently developed to safeguard the ship's steel surfaces from rust corrosion, at a cost of approximately $240,000. The job required the shipyard crew to clean the tank bulkheads by sandblasting the surfaces and to spraypaint the tank walls with the zinc coating material under conditions requiring a dehumidifier. There was no danger in the operation. Petitioner was injured by the yard's failure to properly station and control the hose during the sandsucking operation (the hose falling on petitioner while he was sweeping the floor of the tank).

The yard's crew were laborers (paid $2.18 per hour), performing common painting, as part of the annual maintenance operation (Deft. Exhs. 4, 6), to inhibit rust formation and increase the use of the vessel over its life span. Similar painting operations with sandblasting, sandsucking and spraygun equipment for common paint had been in use for over ten years (Deft. Exh. 8). The respondent itself agreed that the coating procedure was part of the maintenance of the vessel and not repair work (Deft. Exh. 10).

The work was performed by the shipyard because of availability of the equipment to do the work more rapidly and, in the long run, with less expense to the respondent.

The specfic job of coating tank bulkheads had not been done by seamen because the paint was newly developed. That similar work procedures had been customarily performed by ship's crews was ignored by the Court below.

Suit was commenced against the respondent, which then impleaded the shipyard and later discontinued its cross-claim. On motion for summary judgment by the respondent (and cross-motion by petitioner) the suit was dismissed, the District Court ruling that there was not a question of fact as to whether petitioner was entitled to a warranty of seaworthiness in that the work performed by the shipyard crew was not traditionally performed by seamen; that the ship was not in navigation.

The United States Court of Appeals for the Fourth Circuit affirmed on the ground that the petitioner "was not performing the traditional work of a seaman when he was injured aboard the ship".

Reasons for Granting the Writ

1. The decision of the Court below will emasculate the maritime right to a warranty of seaworthiness of an entire class of shipyard workers throughout the country, by taking

from that class the effect of this Court's decision in *Seas* v. *Sieracki*, 328 U.S. 85, enforcing the maritime rights of workers against a shipowner who parcelled out its operations of ship's work to an intermediary employer (paraphrasing *Seas* v. *Sieracki, supra*). Involved herein is the effort by the Court below to limit "traditional" seamen's work to those activities performed in a less technological era of the merchant ship. The decision below was predicated upon absence of the same work having been traditionally performed by seamen, not because of its non-maritime nature, but only because the work involved the use of a new type of paint, only recently developed for protection to surfaces previously rust ravaged. The work, in character, was seamen's work. If the paint had been formulated years before, it would have been used by seamen in the exact manner that ships' crews have always chipped, scraped and painted ship surfaces.

What the Court below failed to consider, and what this Court deemed most important in deciding *United* v. *Halecki*, 358 U.S. 613, and *West* v. *United States*, 361 U.S. 118, was the nature of the work to be performed; to wit, was it maritime in character—work of a pattern done by seamen in days when division of labor had not reached today's level, when the use of today's heavy machinery was almost unknown. The Court below failed to understand that this Court laid down a rule of law envisioning an examination of the maritime character of the work, and incorrectly thought instead in terms of exacting comparisons of the procedures of work in days gone by, now unduly restricting maritime rights of maritime workers to those few moments when repair, overhaul and maintenance of a vessel continues as it did in the past.

Thus, the Court improperly distinguished between a newer method of sandblasting and spraygun painting and the old hammer, chisel and brush procedure, calling the former non-traditional while the latter was traditional; by

improperly distinguishing between an operation to paint tank bulkheads in order to inhibit rust and avoid leaks and a work operation to repair leaks in tank bulkheads (*Lawlor* v. *Socony-Vacuum*, 275 F.2d 599), although the goal was the same—to protect the tank bulkheads for the carriage of cargo. In point of fact, such an approach ensures the slow contraction and ultimate disappearance of maritime rights to workers, such as petitioner, as more work methods change to meet technological improvements. The restrictive concept of the word "traditional" by the Court below was not in keeping with the decisions of this Court enlarging protection under the maritime law to workers of the petitioner's class (*Pope & Talbot* v. *Hawn*, 346 U.S. 406; *United* v. *Halecki*, 358 U.S. 613). Rather it is destructive of the protection afforded by the general maritime law to workers in an industry long noted for the dangerous conditions under which it prospers.

2. The decision below, failing to examine the work operation by the shipyard and holding it to be work not traditionally performed by seamen, was in conflict with the United States Court of Appeals for the Second Circuit in *Lawlor* v. *Socony-Vacuum*, 275 F.2d 599, where the decision of that Court specifically held that the repair of leaks of tank bulkheads, previously performed by ship's crew were maritime in nature when done by shipyard workers (how can the repair of bulkhead leaks be maritime in character while painting the bulkhead to decrease the leaks be non-maritime); and with the United States Court of Appeals for the Fifth Circuit in *Allen* v. *Union*, 239 F. Supp. 1004, aff'd on District Court opinion, 361 F.2d 217, where the work involved installation and renewal of numerous items, installation of a new water cooling system and removal and repair of the propeller shaft, so similar in character to the work involved herein.

Further, the decisions below were in conflict with the United States Courts of Appeals for the Ninth Circuit in

Huff v. *Matson*, 338 F.2d 205, and for the Fifth Circuit in *Deffes* v. *Federal*, 361 F.2d 422, both of which, in the strongest terms, established that the use of new and different machinery in a new work procedure to perform the usual duties of harbor workers were not to be used to destroy the maritime rights of those workers who were entitled to the protection of the warranty of seaworthiness (See also: *Reed* v. *Yaka*, 373 U.S. 410).

3. The Court below in granting summary judgment and ruling that no question of fact existed as to whether the work involved was maritime in nature was in conflict with decisions of this Court in *Butler* v. *Whiteman*, 356 U.S. 271; *West* v. *United States*, 361 U.S. 118 and *Roper* v. *United States* 368 U.S. 20.

Summary

This Court, in its decision in *United* v. *Halecki* 358 U.S. 613, at page 618, footnote 7, specifically left open the very issue involved herein, "whether a shipowner can ever be liable for the unseaworthiness of vessel 'to a shore-based worker who performs labor on a ship which is not ready for a voyage but is out of navigation and docked at a private shipyard for its annual overhaul and repair' ".

That has remained open for decision by the various Courts of Appeals in the myriad of cases determined over the last ten years without any guidelines from this Court. What is certain, however, is that the Fourth Circuit, heavily engaged in this type of litigation because of the Newport News Shipyard in Virginia, has and will play a leading role in deciding these issues. The rigid construction given by the Court below, based not on the pattern of the repairs to indicate the maritime or non-maritime nature of the work, but upon the procedures used to perform the contract cannot and should not become determinative of the issue when it will ultimately totally destroy the maritime rights of the workers protected by this Court since *Seas* v. *Sieracki*, supra.

And was there indeed no question of fact as to whether the petitioner, a shore-based maritime worker for a shipyard, was performing duties maritime in their nature when the vessel was docked in a private shipyard for its annual overhaul and repair.

While the Second and Fifth Circuits in *Lawlor* v. *Socony-Vacuum,* supra, and in *Allen* v. *Union,* supra, have interpreted the *Halecki* decision as holding that the method of the operation was only secondarily important to the question of the basic character of the work performed, the Court below has rigorously and narrowly construed the decision by this Court to limit the maritime rights of shoreside workers to those instances where the specific work had been performed in the same way by seamen years ago. The latter approach is totally inconsistent with the rights of that class of shipyard workers and, petitioner prays, will move this Court to examine what has now become a seemingly concerted effort by the Court below to restrict the rights of maritime workers in the face of decisions by this Court and by various Courts of Appeals to enlarge and enhance those rights.

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated: April 14, 1969.

Respectfully submitted,

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HARVEY GOLDSTEIN
on the Petition

APPENDIX

Memorandum

(Decision of District Court)

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NEWPORT NEWS DIVISION

Civil Action Number 1030

MELVIN MCCOWN,

Plaintiff,

against

HUMBLE OIL & REFINING COMPANY,

Defendant.

The doctrine of "unseaworthiness" of a vessel as establishing liability on a shipowner in favor of a crew member is now too well settled to need comment, except that in the application of such doctrine to non-members of the crew, a restatement of the basic concept can be of value. In *Mahnick* v. *Southern S.S. Co.*,[1] a standard was evolved and is expressed in an oft-quoted paragraph on page 103 of the opinion in this fashion:

> "He (seaman) is subject to the rigorous disciplines of the sea, and all conditions of his service constrain him to accept, without critical examination and without protest, working conditions and appliances as commanded by his superior officers."

[1] 321 U.S. 96 (1944).

McCown was not a member of the ship's crew, but was an employee of Newport News Shipbuilding and Drydock Company and was working aboard. To avail himself of the benefits of the unseaworthiness rationale afforded a seaman he must, therefore, identify the work being done by him at the time of the accident, to be such work as is traditionally done by the ship's crew. In the words of *Sieracki*,[1] as a shore worker, McCown must have been ". . . in short, a seaman doing a seaman's work and incurring a seaman's hazard". We recognize that McCown was a "rigger", an employment rating fairly low in the shipyard pay scale, and that at the time of the accident he was menially engaged in sweeping and cleaning a tank, a common place seaman's labor. All of this was part of inner tank sandblasting which was, in turn, part of the tank coating process. Under the reasoning of *West* v. *United States*, 361 U.S. 118 (1959), when work is being done under a very complex and technical contract by a shoreside expert organization, the test is not to analyze which individual employee handles the metallurgy and which handles the sandblasting, broom and the vacuum cleaner if it is all part of a single pattern of repairs.

This immediate endeavor of McCown was but an integral part of a "higly specialized process of applying zinc tank coating." It would seem therefore that "the focus should be upon the status of the ship, *the pattern* of repairs, and the extensive nature of the work contracted to be done, *rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury*". (emphasis added) *West* v. *United States*, 361 U.S. 118 (1959), page 122. A job analysis based upon what a particular workman was doing at a particular time, says *West*, supra, ". . . would lead to fortuitous results" (page 122).

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[1] *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85 (1946), at page 99.

Here, McCown was injured when struck by a suction hose supplied by Newport News Shipbuilding and Drydock Company, McCown's employer, when the hose fell from a beam aboard the ship where it had been placed by other shipyard employees. The hose was part of "special equipment cositng in excess of $390,000.00, owned and put aboard the vessel by the Newport News Shipbuilding and Drydock Company to *accomplish a tank coating operation.*" "The tank coating phase of the extensive contract cost more than $241,000.00" and it was in this portion of the contract that the plaintiff was involved when injured. The "work called for expensive, complicated equipment requiring specially trained personnel and supervision and using a process which had only recently been invented." It has never been done by a ship or on a ship underway. "None of the equipment belonged to the ship. None of the personnel involved in the process of the actual coating or in the preparation of the tanks were members of the ship's crew." "The dehumidifying processes had to be carefully instituted and controlled by shore based employees of the shipyard. Sandblasting was necessary to prepare the metal surfaces for the coating with zinc of a thickness of .005 of an inch by special equipment."

McCown was involved in this tank coating process, a "work which in its overall nature had never been done by a seaman, had never been part of a seaman's hazard, nor a working condition," in *Sieracki* words, "which a seaman as an adjunct of sea service had ever been constrained to accept." *Raidy* v. *United States,* 153 F. Supp. 777 (D. C. Md. 1957); *United N.Y. & N.J. Sandy Hook Pilots Ass'n* v. *Halecki,* 358 U.S. 614 (1959). In short, McCown, in the judgment of this Court, was not a *Sieracki* seaman and not entitled to any warranty of seaworthiness from the shipowner. This is an industrial accident to which Congress has addressed the appropriate Workmen's Com-

pensation Acts and this shipyard worker should seek his redress there." We cannot approximate McCown, a shipyard employee engaged in a complex, technical work, requiring specialized shipyard equipment put aboard the vessel by the shipyard," to the stevedore injured during loading operations by faulty ship equipment in *Seas Shipping Co.* v. *Sieracki*;[1] or to the carpenter injured repairing ship's loading equipment, during loading, in *Pope & Talbot* v. *Hawn*;[2] or to the stevedore injured during loading by ship's hatch cover in *Atlantic Transport Co.* v. *Imbrovek*;[3] or the stevedore injured by faulty ship's topping lift in loading in *Crumady* v. *The J. H. Fisser*.[4]

Furthermore, the Esso BERMUDA was not in navigation at the time of this accident.

The contract between the shipowner and Newport News Shipbuilding and Drydock Company was for "extensive repairs, renewals and renovations of which the tank coating was only a part." The "total work, cost $407,194.00, was executed alongside the dock at the shipyard" on an availability of "thirty-five (35) days," from "August 8, 1961 through September 12, 1961."

During those thirty-five days, the Esso BERMUDA was a "dead" ship, unable to move under her own power. Her main propulsion engines were torn down, her boilers and valves overhauled. Shipyard employees worked inside her main boilers. All utilities, power, steel, electricity and fresh water were supplied from the dock by the shipyard. She was completely servient to the shipyard for sustenance, fire protection and movement.

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[1] 328 U.S. 85 (1946)

[2] 346 U.S. 406 (1953)

[3] 234 U.S. 52 (1914)

[4] 358 U.S. 423 (1959)

The work to be accomplished encompassed not only the extension tank work and the engine room repairs elsewhere described, but also her conventional steam smothering system for fire fighting was entirely replaced by a foam system; much of her cargo piping system was removed and replaced.

In addition, the crew, while remaining on board, used the lay-up time for vacations. For much of the thirty-five (35) days period there were present on board only a total of three deck and engine room ratings, though the required sailing complement numbered fifteen (15). The fact that some of the crew remained aboard offers no compelling reason that the vessel was in navigation, but on the contrary, points, in "the insufficiency of the sailing complement," that the vessel was indeed out of navigation. *Madden* v. *United States,* 259 F. Supp. 663 (D.C. Mass., 1966).

The evidence is clear that the shipowner had "no control over the vessel in the shipyard as to the work contracted for," except to see that the contract requirements were met. The ship's officers and crew did not participate in the work being done, gave no orders, nor supervised its progress. The signing for the work on its completion by the Captain was simply in the nature of a receipt.

McCown raises the argument that even if the vessel had been removed from navigation, this accident occurred after much of the work disabling the vessel had been accomplished and the ship should be considered as having been returned to navigation. This has been answered by Judge Learned Hand, in *Latus* v. *United States,* 277 F. 2d 264, (2 Cir. 1960), at page 266:

> "... we cannot agree ... that a ship is progressively returned to service as to those parts of her on which the necessary restoration has been done. The warranty of seaworthiness has never been divided into fragments; a ship is either fitted for her duties in all respects, or she is not fitted at all. ..."

The Esso BERMUDA was not in the shipyard for either the short time of 8 days and minor repairs, as in *Lawlor* v. *Socony-Vacuum Oil Co.*, 275 F. 2d 599 (2 Cir. 1960); nor the routine maintenance in *Allen* v. *Union*, 239 F. Supp. 1004 (D.C. La. 1965) nor for voyage repairs or annual inspection as in *Morrell* v. *United States*, 194 F. Supp. 704 (D.C. Cal. 1960).

Counsel for defendant will present a proper order in accordance with this memorandum, sustaining the motion of the defendant for summary judgment in favor of the defendant, and overruling the cross-motion for summary judgment of the plaintiff.

/S/ JOHN MACKENZIE
United States District Judge

Norfolk, Virginia
December 8, 1967.

Decision of United States Court of Appeals for the Fourth Circuit

No. 12,330

MELVIN McCOWN,

Appellant,

versus

HUMBLE OIL & REFINING COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News
John A. MacKenzie, District Judge.

(Argued October 30, 1968 Decided January 16, 1969.)

Before CRAVEN and BUTZNER, Circuit Judges, and McMILLAN, District Judge.

Harvey Goldstein (Ellenson & Fox on brief) for Appellant, and John W. Winston (Seawell, McCoy, Winston & Dalton; William McL. Ferguson, and Ferguson & Harvell on brief) for Appellee.

BUTZNER, *Circuit Judge:*

The district court held that Melvin McCown, a shipyard worker, was not entitled to the warranty of seaworthiness and granted summary judgment for Humble Oil & Refining Company, owner of the tanker, Esso BERMUDA. We affirm because McCown was not performing the traditional work of a seaman when he was injured aboard the ship.

Humble sent the Esso BERMUDA to the Newport News Shipbuilding & Drydock Company for work that cost $407,194 and required 36 days. During this time, electricity, steam, and fresh water were supplied by the yard. The tanker's boilers were shut down and overhauled. Her main throttle was disasembled and taken ashore for repairs and replacements. Additional items of work included installation of four soot blowers, installation of a fire fighting system, and repairs to pipes and valves.

The single largest item of work, costing $241,605, involved sandblasting and coating 12 cargo tanks with a comparatively new process developed and specified by Humble. The interior surfaces of the tanks were sandblasted to bare, clean metal. Under conditions of controlled humidity, obtained through the shipyard's dehumidifying equipment, the tanks were then coated with inorganic zinc silicate applied by spraying to a dry film thickness of .005 inches. The coating process was done by shipyard workers using specialized, expensive equipment furnished by the yard. Esso BERMUDA's equipment was not used, and although some of the crew remained aboard carrying out their duties, none were assigned to the job. The shipyard had exclusive control over the work and its employees. The yard's performance of its contract was subject to approval of Humble's shore-based inspectors.

As his part in the coating process, McCown swept sand that accumulated from sandblasting in the tank to a sand sucking hose. Both the hose and the machine providing suction were owned and operated by the shipyard. McCown was injured when a part of the sand sucking hose fell on him from a beam of the vessel where it had been placed by other shipyard employees. He alleged negligence and unseaworthiness, but he abandoned the negligence count. Both parties filed motions for summary judgment raising the issue of the application of the warranty of seaworthiness.

Frequently the question of whether a shore-based worker is entitled to the warranty of seaworthiness may involve disputed facts or conflicting inferences which require submission to a jury. If, however, the facts conclusively demonstrate that the worker is not performing a traditional task of a seaman, it is error to submit the issue of unseaworthiness to a jury. *United N.Y. & N.J.S.H. Pilots' Ass'n.* v. *Halecki,* 358 U.S. 613 (1959). The facts on which McCown bases his claim are uncontradicted, and there exist no conflicting inferences requiring that the case be submitted to a jury. We find no error in the court's disposition by summary judgment. Cf. *Van Horn* v. *Gulf Atlantic Towing Corp.,* 388 F.2d 636 (4th Cir. 1968).[1]

In order for a shore-based worker to recover for injuries caused by unseaworthiness, he must establish that he was doing a seaman's work[2] and that at the time of his injury

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[1] The fact that both parties move for summary judgment does not establish that there is no issue of fact. 3 Barron & Holtzoff, *Federal Practice & Procedure* § 1239 (Wright's ed.1958). McCown's counsel, however, advised the trial court of the propriety of deciding the issue by summary judgment. He said:

> "Now for the purpose of the argument itself: As the defendant has stated, and we agree with the defendant that there are enough facts, or we believe that there are enough facts, presented to the Court for the Court to make a decision as to whether or not the plaintiff is entitled to the warranty of seaworthiness."

[2] Seas Shipping Co. v. Sieracki, 328 U.S. 85, 99 (1946). For other cases allowing recovery on the ground that an injured shore-based worker was performing work traditionally done by the ship's crew, see Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953); Shenker v. United States, 322 F.2d 622 (2d Cir. 1963), *cert. denied,* 376 U.S. 907 (1964); Lawlor v. Socony-Vacuum Oil Co., 275 F.2d 599 (2d Cir. 1960), *cert. denied,* 363 U.S. 844 (1960).

For cases denying recovery on the ground that work performed by an injured shore-based worker was not the type traditionally done by a ship's crew, see United N.Y. & N.J.S.H. Pilots' Ass'n v.

the vessel was not a "dead" ship, but on the contrary was in navigation.[3]

Whether McCown has the status of a seaman cannot be determined merely from the fact that he was sweeping one of the ship's tanks. The character of his work must be measured by the contract the shipyard was called upon to perform. In *United N.Y. & N.J.S.H. Pilots' Ass'n* v. *Halecki,* 358 U.S. 613 (1959), the vessel was brought to a shipyard for annual overhaul which included dismantling and overhauling the ship's generators A shore-based worker employed by a subcontractor was killed by fumes from carbon tetrachloride with which he was cleaning the generators. The Court denied recovery because the decedent was not doing the type of work traditionally done by the ship's crew. In reaching this conclusion the Court looked to the entire job—not simply that part the decedent was performing, saying (358 U.S. at 618):

> "It avails nothing to say that the decedent was an 'electrician,' and that many modern ships carry electricians in their crew. Pope & Talbot, Inc. v. Hawn explicitly teaches that such labels in this domain are meaningless. See 346 US at 413. It is scarcely more helpful to indulge in the euphemism that the decedent was 'cleaning' part of the ship, and to say that it is a traditional duty of seamen to keep their ship clean. The basic fact is, in the apt words of Judge Lumbard's dissenting opinion in the Court of Appeals, that the decedent 'was not doing

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Halecki, 358 U.S. 613 (1959); McQuaid v. United States, 337 F.2d 483 (3rd Cir. 1964). In Kermarec v. Transathlantique, 358 U.S. 625,629 (1959), recovery under the warranty was denied to a guest.

[3] Roper v. United States, 368 U.S. 20 (1961); Van Horn v. Gulf Atlantic Towing Corp., 388 F.2d 636 (4th Cir. 1968).

what any crew member had ever done on this ship or anywhere else in the world so far as we are informed."[4]

McCown urges that the sandblasting and coating process for the tanks is simply a current method of performing with modern machinery the traditional maritime tasks of a seaman—chipping and painting. He relies upon a number of cases which hold that the use of newly developed machinery to perform a seaman's task does not avoid liability for unseaworthiness.[5] The difficulty with McCown's argument is not the principle of law upon which he relies, but the facts concerning the type of work being performed. The evidence disclosed that the tank coating process in which McCown was engaged had never been done by any seaman at any time. The work required equipment and techniques never possessed by seamen. It was not merely an improved method of preserving tanks, for previously no means of preservation was available. Formerly the tanks were allowed to rust until they became unserviceable

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[4] In West v. United States, 361 U.S. 118, 122 (1959), the Court touched upon the same subject in considering the closely related problem of whether a ship in repair docks for overhaul was "in navigation." The Court pointed out that consideration should be given to "the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury. The job analysis which the latter would call for would lead to fortuitous results."

[5] See Deffes v. Federal Barge Lines, 361 F.2d 422 (5th Cir. 1966), *cert. denied,* 385 U.S. 969 (1966); Duffy v. Matson Navigation Co., 338 F.2d 205 (9th Cir. 1964) *cert. denied,* 380 U.S. 943 (1965); Rodriguez v. Coastal Ship Corp., 210 F. Supp. 38 (S.D. N.Y. 1962). *Contra,* McKnight v. N. M. Paterson & Sons, 181 F.Supp. 434 (N.D. Ohio 1960), *aff'd,* 286 F.2d 250 (6th Cir. 1960), *cert. denied,* 368 U.S. 913 (1961).

and required replacement, a major undertaking not performed by seamen.

McCown's reliance on *Allen* v. *Union Barge Line Corp.*, 239 F.Supp. 1004 (E.D. La. 1965), *aff'd*, 361 F.2d 217 (5th Cir. 1966), *cert. denied*, 385 U.S. 1006 (1967), and *Lawlor* v. *Socony-Vacuum Oil Co.*, 275 F.2d 599 (2d Cir. 1960) is misplaced. In both cases a shipyard worker who was injured aboard a vessel laid up for annual overhaul was entitled to damages against the shipowner. In *Allen* the ship was receiving routine annual maintenance, and the worker in removing a bearing from a propeller shaft was doing a task traditionally performed by seamen in maintaining the ship. In *Lawlor* the overhaul of the ship involved a large number of miscellaneous, minor items. The injured shipyard worker supervised marking leaks and cracks in the bulkheads. The chief officer of the ship testified that when the vessel was not in a shipyard the task of locating and temporarily repairing leaks in the bulkhead was done by members of the crew using equipment carried on board for that purpose. The reason for extending protection to shore-based workers in *Allen* and *Lawlor* is found in *Seas Shipping Co.* v. *Sieracki*, 328 U.S. 85, 95 (1946):

> "All the consideration which gave birth to the liability [for unseaworthiness] and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection."

When, however, the worker is not performing a seaman's task, no basis exists for extending the warranty of seaworthiness. Instead the injured worker must look to his

own employer, or if the shipowner is negligent, seek redress for a maritime tort. *White* v. *United States*, 400 F.2d 74 (4th Cir. 1968); *Van Horn* v. *Gulf Atlantic Towing Corp.*, 388 F.2d 636 (4th Cir. 1968). Because McCown was not engaged in the type of work traditionally done by a ship's crew, he was not a member of the class to whom the warranty of seaworthiness extended. We, therefore, find it unnecessary to consider Humble's additional defense that the tanker was out of navigation, and for this reason Humble did not warrant the seaworthiness of the vessel.

The judgment of the district court is affirmed.

Final Order of District Court

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NEWPORT NEWS DIVISION

Civil Action No. 1030

MELVIN MCCOWN,

Plaintiff,

vs.

HUMBLE OIL & REFINING COMPANY,

Defendant.

This matter presently stands upon the Motion for Summary Judgment filed by Humble Oil & Refining Company and on the Cross-Motion for Summary Judgment filed by Melvin McCown. Both Motions were addressed

to the sole issue of whether the warranty of seaworthiness extended to Melvin McCown, the count founded in negligence having previously been withdrawn by plaintiff McCown.

The Court has duly considered the uncontradicted facts offered by the parties, evidenced by their supporting Affidavits, depositions, and exhibits, and the legal briefs and argument of counsel, and has found for the reason set forth in its Memorandum dated December 8, 1967, that the warranty of seaworthiness did not extend to Melvin McCown when he sustained injury aboard defendant's vessel Esso BERMUDA on September 7, 1961, at Newport News, Virginia, and that he thus has no cause of action to pursue against Humble Oil & Refining Company.

Such Memorandum dated December 8, 1961, is adopted by the Court as its Findings of Fact and Conclusions of Law with reference to the respective Motion and Cross-Motion for Summary Judgment.

There being no genuine issue as to any material fact, and Humble Oil & Refining Company being entitled to judgment as a matter of law,

It is now ADJUDGED, ORDERED AND DECREED that Summary Judgment as sought by Melvin McCown is denied him, but that Summary Judgment as sought by Humble Oil & Refining Company is hereby granted and the suit filed by Melvin McCown is ORDERED dismissed with prejudice to the plaintiff.

The Court notes that the trial of this cause on its merits has been previously scheduled for February 27, 1968. Since the Court's ruling now disposes of this matter in its entirety, such scheduled trial date is cancelled and the Clerk of this Court is directed to remove this litigation from its docket.

To which actions of the Court in denying his said Cross-Motion and in granting the said Motion of Humble Oil & Refining Company, plaintiff Melvin McCown does note his objections.

S/ JOHN McKENZIE
United States District Judge

Norfolk, Virginia
Date: Dec. 26, 1967.

We ask for this:

/S/ JOHN W. WINSTON and WM. FERGUSON
FERGUSON & HARVELL and
SEAWELL, McCOY, WINSTON & DALTON, p.d.

Seen and objected to:

/S/ LOUIS ELLENSON
ELLENSON & FOX and
GOLDSTEIN & STERENFELD, p.q.

Judgment of United States Court of Appeals For the Fourth Circuit

No. 12,330

MELVIN MCCOWN,

Appellant,

VS.

HUMBLE OIL & REFINING COMPANY,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

SAMUEL W. PHILLIPS
Clerk

FILED
Jan. 16, 1969

SAMUEL W. PHILLIPS
Clerk
(SEAL)

A True Copy, Teste:

SAMUEL W. PHILLIPS, Clerk

By MARGARET M. WALTON
Deputy Clerk